

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

12 WILLIE J. SMITH, JR.,)
13 Petitioner,) 2:08-cv-1552-GMN-VCF
14 vs.) **ORDER**
15 BRIAN WILLIAMS, *et al.*,)
16 Respondents.) /

18 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
19 by a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

20 || I. Background and Procedural History

21 A complaint was filed in Clark County Justice Court on October 13, 2000, charging
22 petitioner with one count of trafficking a controlled substance. (Exhibit 1).¹ A preliminary hearing
23 was held on February 27, 2001, at which petitioner was ordered to stand trial on the charge. (Exhibit
24 2). An information was filed on March 13, 2001. (Exhibit 3). Petitioner entered a plea of not guilty

¹ The exhibits referenced in this order are found in the Court's record at ECF No. 22.

1 on March 13, 2001. (Exhibit 4). A pretrial hearing was held on April 21, 2001. (Exhibit 5). The
2 issue of a possible Fourth Amendment violation was raised and a briefing schedule was set.

3 Petitioner filed a motion to suppress on October 12, 2001. (Exhibit 6). At a hearing on
4 November 8, 2001, the state district court denied the motion, and a written order was filed November
5 14, 2001. (Exhibit 9).

6 From November 2001 and May 2002, petitioner dismissed his prior counsel, and was
7 appointed new counsel. (Exhibits 10-19). On July 12, 2002, the State filed a motion to file an
8 amended information, which would include habitual criminal language based on five prior felonies.
9 (Exhibit 20). The court granted the motion on September 3, 2002. (Exhibit 21). An amended
10 information was filed the same day. (Exhibit 22).

11 On August 1, 2002, petitioner filed a motion to dismiss his newly appointed counsel.
12 (Exhibit 23). The court held several hearings regarding petitioner's issues with counsel and his case.
13 (Exhibits 24-31). On January 21, 2003, the court canvassed petitioner regarding his desire to
14 represent himself. (Exhibit 32). As a result of the hearing, petitioner was allowed to represent
15 himself, with trial counsel then serving as standby counsel for petitioner.

16 Petitioner moved to disqualify the judge on grounds of personal bias. (Exhibit 33). After
17 hearings, the motion to disqualify the judge was denied. (Exhibits 35-39).

18 Petitioner filed several motions with the court, including a motion to suppress. (Exhibits 40-
19 48). On March 26, 2003, petitioner filed a mandamus petition with the Nevada Supreme Court
20 regarding the Fourth Amendment issue. (Exhibit 49). The Nevada Supreme Court declined to
21 consider the petition. (Exhibit 50).

22 In the next year, petitioner filed many pretrial motions, including motions repeating the
23 Fourth Amendment issue and motions requesting disqualification of the trial court judge. (Exhibits
24 51-104).

25

26

1 A second amended information was filed on April 13, 2004. (Exhibit 105). A jury trial
2 began, with jury selection held on April 13, 2004. (Exhibit 106). Trial testimony was taken on April
3 14, 2004. (Exhibit 107). Closing argument was made on April 15, 2004. (Exhibit 108). Jury
4 instructions were made part of the record. (Exhibit 109). On April 15, 2004, the jury returned its
5 verdict and found petitioner guilty. (Exhibit 110). The Court heard several post-trial motions by
6 petitioner, all of which were denied. (Exhibits 111-119). Petitioner was sentenced on August 3,
7 2004. (Exhibit 120). Judgments of conviction were filed on August 12, 2005, and March 25, 2005.
8 (Exhibits 121, 122). Petitioner was sentenced to 72 to 180 months in state prison. (*Id.*). Petitioner
9 filed a timely notice of appeal. (Exhibit 123).

10 Petitioner was not allowed to represent himself on direct appeal. A newly appointed counsel
11 filed an opening brief on his behalf on September 28, 2005. (Exhibit 124). An amended brief was
12 filed October 11, 2005. (Exhibit 125). The answering brief was filed October 26, 2005. (Exhibit
13 126). On March 14, 2006, petitioner filed a motion to “reopen” his direct appeal due to ineffective
14 assistance of counsel. (Exhibit 127). The Nevada Supreme Court declined relief and advised
15 petitioner to raise ineffective assistance claims in a post-conviction petition. (Exhibit 128). On May
16 2, 2006, the Nevada Supreme Court affirmed the conviction. (Exhibit 129).

17 On August 23, 2006, petitioner filed his post-conviction habeas petition and memorandum in
18 the state district court. (Exhibit 130 and 131). The district court entered findings of fact and
19 conclusions of law, denying the petition. (Exhibit 135). Petitioner filed a timely notice of appeal.
20 (Exhibit 136). On September 25, 2008, the Nevada Supreme Court issued its order of affirmance
21 and denied all claims for relief. (Exhibit 137).

22 This Court received the federal petition on November 12, 2008. (ECF No. 1). On November
23 26, 2008, the Court dismissed the petition as successive and submitted outside the applicable
24 limitations period. (ECF No. 2). Judgment was entered on the same date. (ECF No. 3).

25

26

1 On December 30, 2008, petitioner filed a motion for reconsideration. (ECF No. 5). On
 2 January 14, 2009, petitioner filed a motion to reopen his case. (ECF No. 6). By order filed April 21,
 3 2009, this Court granted petitioner's motion for reconsideration, noting that petitioner has multiple
 4 convictions and multiple habeas petitions in this Court. (ECF No. 11). In the order of April 21,
 5 2009, the Court expressed no opinion as to whether procedural defenses might apply to the petition.
 6 (*Id.*). The respondents were directed to respond to the petition, in particular, to Part I of the petition,
 7 at pp. 1-2, and Part 2 of the petition, at pp. 1-87.² (*Id.*).

8 The federal habeas petition raises 30 grounds, as follows: (1) the trial court lacked
 9 jurisdiction; (2) lack of probable cause; (3) insufficient evidence; (4) "procedural default"; (5) Fourth
 10 Amendment issue; (6) *Brady* violation; (7) *Batson* violation; (8) Fourth Amendment; (9) motion for
 11 new trial; (10) use of perjury; (11) *Miranda* violation; (12) chain of custody; (13) confrontation
 14 issue; (14) trial counsel's failure to investigate; (15) standby counsel was ineffective; (16) appellate
 15 counsel was ineffective (containing 33 subparts); (17) prosecutorial misconduct; (18) prosecutorial
 16 misconduct; (19) prosecutorial misconduct; (20) abuse of discretion; (21) jury instructions; (22)
 17 judicial bias; (23) judicial bias; (24) judicial bias; (25) incomplete records; (26) sentencing errors;
 18 (27) cumulative error; (28) inadequate appellate review; (29) conspiracy; and (30) inadequate
 19 appellate review. (Petition, at ECF No. 12).

20 Respondents filed a motion to dismiss the petition. (ECF No. 22). By order filed February
 21 25, 2010, this Court entered an order, finding the following: (1) Grounds 3, 9, 10, 11, 12, 13, 17, 18,
 22 19, 20, 21, 22, 23, 24, 25, 26, and 29 of the federal habeas petition were dismissed as procedurally
 23 defaulted; (2) Grounds 4, 5, 8, 15, 28, and 30 of the petition were dismissed for failure to state a
 24 cognizable claim for federal habeas relief; (3) Ground 2 of the petition is unexhausted; and (4) The
 25 portion of Ground 6 pertaining to unproduced photographs and videotape is exhausted, but the
 26

² The Court notes that Part I, pp. 3-85 of the petition consists of exhibits, including briefs and state court decisions. (ECF No. 12).

1 remainder of the Ground 6 (pertaining to Burger Management's change of address, information
 2 regarding who authorized the security officers to wear badges, contracts between Burger
 3 Management and other entities, and information regarding the credibility of the State's witnesses) is
 4 unexhausted. (ECF No. 29). The Court granted petitioner options for handling his unexhausted
 5 claims, including the option of returning to state court to exhaust his state-court remedies with
 6 respect to certain of his grounds for relief. (*Id.*). On March 10, 2010, petitioner filed a motion to
 7 dismiss (abandon) his unexhausted claims and proceed on the remaining claims in the petition.
 8 (ECF No. 30). Respondents filed an answer to the remaining grounds of the petition, which includes
 9 discussion of Ground 1, a portion of Ground 6, Ground 7, Ground 14, Ground 16 (with subparts),
 10 and Ground 27. (ECF No. 31). Petitioner filed a reply. (ECF No. 32). The Court now addresses the
 11 merits of the remaining grounds of the petition.

12 **II. Federal Habeas Corpus Standards**

13 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
 14 provides the legal standard for the Court's consideration of this habeas petition:

15 An application for a writ of habeas corpus on behalf of a person in
 16 custody pursuant to the judgment of a State court shall not be granted
 17 with respect to any claim that was adjudicated on the merits in State
 18 court proceedings unless the adjudication of the claim –

19 (1) resulted in a decision that was contrary to, or involved an
 20 unreasonable application of, clearly established Federal law, as
 21 determined by the Supreme Court of the United States; or

22 (2) resulted in a decision that was based on an unreasonable
 23 determination of the facts in light of the evidence presented in the State
 24 court proceeding.

25 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications
 26 in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect
 to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.

1 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
 2 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
 3 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
 4 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
 5 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

6 A state court decision is an unreasonable application of clearly established Supreme Court
 7 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
 8 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
 9 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
 10 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
 11 than merely incorrect or erroneous; the state court’s application of clearly established federal law
 12 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

13 In determining whether a state court decision is contrary to, or an unreasonable application of
 14 federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501
 15 U.S. 797, 803-04 (1991); *Shackelford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by a State court
 16 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
 17 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

19 **III. Discussion**

20 **A. Ground 1**

21 Petitioner claims that the state trial court lacked jurisdiction over his case. Petitioner argues
 22 that the apartment complex at which he was arrested was owned by a federal agency, Housing and
 23 Urban Development (HUD). Petitioner argues that the Nevada Supreme Court ignored the “nexus
 24 test” under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). As the Nevada Supreme
 25 Court determined, there was “some nexus” between the federal agency (HUD) and the apartment
 26

1 complex, but petitioner failed to show that the apartment complex was under the exclusive
2 jurisdiction of the federal government. (Exhibit 137, at pp. 2-3; Exhibit 129, at pp. 1-4). The
3 Nevada Supreme Court examined the record and detailed its findings, concluding that the weight of
4 the evidence supported the State's theory that the security guards at the apartment complex were
5 private security and not federal agents. (Exhibit 129, at p. 3). The factual findings of the state court
6 are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving
7 that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of,
8 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
9 was based on an unreasonable determination of the facts in light of the evidence presented in the
10 state court proceeding. Habeas relief is denied on Ground 1 of the petition.

11 **B. Ground 6**

12 In the federal petition, petitioner alleges a violation under *Brady v. Maryland*, 373 U.S. 83
13 (1963). A similar claim was raised in petitioner's direct appeal, however, on direct appeal, the
14 allegations pertained to unproduced photographs and videotape. (Exhibit 125, at p. 22). Ground 6 of
15 the federal petition pertains to unproduced photographs and videotape, but also pertains to many
16 other factual items, including Burger Management's change of address, information regarding who
17 authorized the security officers to wear badges, contracts between Burger Management and other
18 entities, and information regarding the credibility of the State's witnesses. (ECF No. 12, at pp. 14-
19 15). As such, in the order filed February 25, 2010, this Court determined that the portion of Ground
20 6 pertaining to unproduced photographs and videotape is exhausted, but the remainder of the Ground
21 6 is not exhausted. (ECF No. 29, at pp. 8-9). This Court construes petitioner's document entitled
22 "Motion to Dismiss Unexhausted Claims" (ECF No. 30) as an abandonment of the unexhausted
23 portions of Ground 6. Therefore, the Court will now review the exhausted portion of Ground 6,
24 namely, the allegation that the State failed to produce photographs and videotape in violation of
25 *Brady v. Maryland*, 373 U.S. 83 (1963).

1 The suppression by prosecution of evidence favorable to an accused violates due process
 2 where the evidence is material either to guilt or punishment, irrespective of the good faith of the
 3 prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). There are three components of a *Brady*
 4 violation: (1) the evidence at issue must be favorable to the accused either because it is exculpatory
 5 or because it is impeaching; (2) the evidence must have been suppressed by the State either willfully
 6 or inadvertently; and (3) prejudice must have ensued. *Banks v. Dretke*, 540 U.S. 668, 691 (2004);
 7 *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). “Such evidence is material ‘if there is a
 8 reasonable probability that, had the evidence been disclosed to the defense, the result of the
 9 proceeding would have been different.’” *Strickler v. Greene*, 527 U.S. at 280 (quoting *United States*
 10 *v. Bagley*, 473 U.S. 667, 682 (1985)). “[T]here is never a real ‘*Brady* violation’ unless the
 11 nondisclosure was so serious that there is a reasonable probability that the suppressed evidence
 12 would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. at 281. A “reasonable
 13 probability” is a probability sufficient to undermine confidence in the outcome. *United States v.*
 14 *Bagley*, 473 U.S. at 681-82; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“The question is
 15 not whether the defendant would more likely than not have received a different verdict with the
 16 evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict
 17 worthy of confidence.”).

18 In the instant case, petitioner alleges that the State failed to provide him with exculpatory
 19 evidence in violation of *Brady*, specifically, photographs and surveillance video taken the night of
 20 his arrest that showed that he did not damage the apartment security gate. As he argued in his direct
 21 appeal to the Nevada Supreme Court, petitioner argues that this evidence would have shown that the
 22 security guards lacked probable cause to detain and search him on suspicion of destroying private
 23 property or trespass. The Nevada Supreme Court rejected the *Brady* claim, as follows:

24 To establish a valid *Brady* claim, a defendant must show that the
 25 evidence was favorable to him, the evidence was withheld by the State,
 26 and the evidence was material, i.e., prejudicial. As discussed above,
 the security guards were acting in a private, rather than governmental,

1 capacity when they detained and searched Smith. Thus, even assuming
 2 that evidence was withheld by the State that showed the guards did not
 3 have reasonable suspicion to detain him, it would nevertheless be
 4 immaterial and could not therefore establish a violation of Brady.
 5 Rather, evidence admitted at trial showed that the North Las Vegas
 6 Police Department had probable cause to arrest Smith on a charge of
 7 trafficking in a controlled substance. We conclude that Smith has not
 8 established a valid Brady claim and he is not entitled to relief on his
 9 basis.

10 (Exhibit 129, at p. 5) (footnotes omitted).

11 This Court notes that the alleged photographs of the undamaged gate would not have been
 12 favorable to petitioner, or even relevant, because petitioner was not charged with damaging the gate.
 13 As such, any photographs of the gate would not have been relevant to the question of whether or not
 14 petitioner possessed a controlled substance, and could not have prejudiced petitioner. Additionally,
 15 trial testimony reveals that, in fact, there was no video of petitioner either possessing drugs or
 16 damaging the gate. (Exhibit 107, at p. 163). As noted by the Nevada Supreme Court, there was no
 17 video of petitioner relevant to this incident. (Exhibit 137, at p. 9).³ Petitioner has failed to
 18 demonstrate to this Court that: (1) the alleged photos and videotape were favorable to him either
 19 because they were exculpatory or because they were impeaching; (2) the alleged photos and video
 20 were suppressed by the State either willfully or inadvertently; and (3) prejudice resulted. *See Brady*
 21 *v. Maryland*, 373 U.S. 83, 87; *Banks v. Dretke*, 540 U.S. 668, 691; *Strickler v. Greene*, 527 U.S. 263,
 22 281-82.

23 The Nevada Supreme Court correctly applied the clearly established federal law of *Brady v.*
 24 *Maryland*, 373 U.S. 83, 87 (1963) to petitioner's claim. (Exhibit 129, at p. 5). The factual findings
 25 of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his
 26 burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an

27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000
 1001
 1002
 1003
 1004
 1005
 1006
 1007
 1008
 1009
 10010
 10011
 10012
 10013
 10014
 10015
 10016
 10017
 10018
 10019
 10020
 10021
 10022
 10023
 10024
 10025
 10026
 10027
 10028
 10029
 10030
 10031
 10032
 10033
 10034
 10035
 10036
 10037
 10038
 10039
 10040
 10041
 10042
 10043
 10044
 10045
 10046
 10047
 10048
 10049
 10050
 10051
 10052
 10053
 10054
 10055
 10056
 10057
 10058
 10059
 10060
 10061
 10062
 10063
 10064
 10065
 10066
 10067
 10068
 10069
 10070
 10071
 10072
 10073
 10074
 10075
 10076
 10077
 10078
 10079
 10080
 10081
 10082
 10083
 10084
 10085
 10086
 10087
 10088
 10089
 10090
 10091
 10092
 10093
 10094
 10095
 10096
 10097
 10098
 10099
 100100
 100101
 100102
 100103
 100104
 100105
 100106
 100107
 100108
 100109
 100110
 100111
 100112
 100113
 100114
 100115
 100116
 100117
 100118
 100119
 100120
 100121
 100122
 100123
 100124
 100125
 100126
 100127
 100128
 100129
 100130
 100131
 100132
 100133
 100134
 100135
 100136
 100137
 100138
 100139
 100140
 100141
 100142
 100143
 100144
 100145
 100146
 100147
 100148
 100149
 100150
 100151
 100152
 100153
 100154
 100155
 100156
 100157
 100158
 100159
 100160
 100161
 100162
 100163
 100164
 100165
 100166
 100167
 100168
 100169
 100170
 100171
 100172
 100173
 100174
 100175
 100176
 100177
 100178
 100179
 100180
 100181
 100182
 100183
 100184
 100185
 100186
 100187
 100188
 100189
 100190
 100191
 100192
 100193
 100194
 100195
 100196
 100197
 100198
 100199
 100200
 100201
 100202
 100203
 100204
 100205
 100206
 100207
 100208
 100209
 100210
 100211
 100212
 100213
 100214
 100215
 100216
 100217
 100218
 100219
 100220
 100221
 100222
 100223
 100224
 100225
 100226
 100227
 100228
 100229
 100230
 100231
 100232
 100233
 100234
 100235
 100236
 100237
 100238
 100239
 100240
 100241
 100242
 100243
 100244
 100245
 100246
 100247
 100248
 100249
 100250
 100251
 100252
 100253
 100254
 100255
 100256
 100257
 100258
 100259
 100260
 100261
 100262
 100263
 100264
 100265
 100266
 100267
 100268
 100269
 100270
 100271
 100272
 100273
 100274
 100275
 100276
 100277
 100278
 100279
 100280
 100281
 100282
 100283
 100284
 100285
 100286
 100287
 100288
 100289
 100290
 100291
 100292
 100293
 100294
 100295
 100296
 100297
 100298
 100299
 100300
 100301
 100302
 100303
 100304
 100305
 100306
 100307
 100308
 100309
 100310
 100311
 100312
 100313
 100314
 100315
 100316
 100317
 100318
 100319
 100320
 100321
 100322
 100323
 100324
 100325
 100326
 100327
 100328
 100329
 100330
 100331
 100332
 100333
 100334
 100335
 100336
 100337
 100338
 100339
 100340
 100341
 100342
 100343
 100344
 100345
 100346
 100347
 100348
 100349
 100350
 100351
 100352
 100353
 100354
 100355
 100356
 100357
 100358
 100359
 100360
 100361
 100362
 100363
 100364
 100365
 100366
 100367
 100368
 100369
 100370
 100371
 100372
 100373
 100374
 100375
 100376
 100377
 100378
 100379
 100380
 100381
 100382
 100383
 100

1 unreasonable application of, clearly established federal law, as determined by the United States
 2 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of
 3 the evidence presented in the state court proceeding. This Court denies habeas relief on Ground 6 of
 4 the petition.

5 **C. Ground 7**

6 Petitioner contends that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986) with the
 7 use of a peremptory challenge. Petitioner does not identify the juror at issue, but on direct appeal, he
 8 challenged Juror 118's dismissal under *Batson*. (Exhibit 129, at p. 6). On direct appeal, petitioner
 9 argued that Juror 118 was dismissed for the stated reasons of age and her husband's unemployment.
 10 (Exhibit 125, at p. 24). Petitioner contended that those reasons were false and that the true reason for
 11 dismissal was the juror's race. Petitioner provided no detail to support this claim. (*Id.*).

12 In *Batson*, the United States Supreme Court forbid prosecutors from purposefully striking
 13 prospective jurors solely on account of a juror's race. *Batson*, 476 U.S. at 86. The burden is on the
 14 defendant to show "purposeful discrimination." *Id.* at 93. Once a *prima facia* showing has been
 15 made, the prosecutor must prove to the court that race-neutral criteria were the basis for the strike.
 16 *Id.* at 94. The prosecutor's reason for the strike must be a "reason that does not deny equal
 17 protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). The court must then determine if the
 18 defendant has "carried his burden of proving purposeful discrimination." *Hernandez v. New York*,
 19 500 U.S. 352, 359 (1991). The court is not required to make specific findings and need do no more
 20 than overrule a defendant's *Batson* objection. *U.S. v. Gilliam*, 167 F.3d 1273, 1278 (9th Cir. 1999).

21 On habeas review, under the AEDPA, a state court's findings of fact, such as that a
 22 prosecutor's reasons or actual motives for challenging a juror were race-neutral, are "presumed
 23 correct absent clear and convincing evidence to the contrary." *Mittleider v. Hall*, 391 F.3d 1039,
 24 1050 (9th Cir. 2004); *see also Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (presumption of
 25

1 correctness must apply to *Batson* determination made by trial court, as its “resolution depends
 2 heavily on the trial court’s appraisal of witness credibility and demeanor.”).

3 On direct appeal, the Nevada Supreme Court rejected petitioner’s *Batson* claim pertaining to
 4 Juror 118. (Exhibit 129, at pp. 6-7). The Nevada Supreme Court found that Juror 118 was
 5 dismissed because she appeared to be young and her husband was unemployed. (*Id.*, at p. 6). The
 6 Nevada Supreme Court also found that there were three jurors of petitioner’s same race which were
 7 seated for the case. (*Id.*). These findings are supported by the trial record. (Exhibit 106, at p. 159).
 8 Juror 118 was the youngest on the panel and had an unemployed husband, all of which the
 9 prosecutor felt would bias the juror on the issue of drug use. (*Id.*, at p. 160). The trial court noted on
 10 the record that the juror at issue did in fact look “pretty young.” (*Id.*, at p. 162). The trial court then
 11 found there was no pattern of discrimination and that the State’s reasons for the dismissal were race
 12 neutral, and thus the trial court overruled the *Batson* challenge. (*Id.*, at p. 162).

13 Petitioner has not shown that the Nevada Supreme Court’s rejection of his claim regarding
 14 Juror 118 violated *Batson*. Age and maturity, as evidenced by employment or family relationships,
 15 are race-neutral reasons to excuse a juror. *Jordan v. Lefevre*, 293 F.3d 587, 595 (2nd Cir. 2002).
 16 Petitioner has failed to meet his burden of proving that the state court’s ruling was contrary to, or
 17 involved an unreasonable application of, clearly established federal law, as determined by the United
 18 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in
 19 light of the evidence presented in the state court proceeding. Habeas relief is denied on Ground 7 of
 20 the petition.

21 **D. Ground 14**

22 Petitioner contends that his trial counsel was ineffective for several reasons, primarily related
 23 to the failure investigate. Petitioner represented himself at trial and had standby counsel. Prior to
 24 that, petitioner had appointed counsel. Counsel was primarily involved in the early stages of the case
 25 and litigated the first motion to suppress filed with the trial court.

1 Ineffective assistance of counsel claims are governed by the two-part test announced in
 2 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
 3 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the
 4 attorney made errors so serious that he or she was not functioning as the “counsel” guaranteed by the
 5 Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
 6 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
 7 ineffectiveness, the defendant must show that counsel’s representation fell below an objective
 8 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
 9 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
 10 would have been different. *Id.* A reasonable probability is “probability sufficient to undermine
 11 confidence in the outcome.” *Id.* Additionally, any review of the attorney’s performance must be
 12 “highly deferential” and must adopt counsel’s perspective at the time of the challenged conduct, in
 13 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner’s
 14 burden to overcome the presumption that counsel’s actions might be considered sound trial strategy.

15 *Id.*

16 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
 17 performance of counsel resulting in prejudice, “with performance being measured against an
 18 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*
 19 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
 20 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
 21 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
 22 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of
 23 reasonable professional assistance. *Id.*

24 The United States Supreme Court has described federal review of a state supreme court’s
 25 decision on a claim of ineffective assistance of counsel as “doubly deferential.” *Cullen v. Pinholster*,

1 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The
 2 Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s performance
 3 through the “deferential lens of § 2254(d).”” *Id.* at 1403 (internal citations omitted). Moreover,
 4 federal habeas review of an ineffective assistance of counsel claim is limited to the record before the
 5 state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401.

6 Petitioner’s claims of ineffective assistance of trial counsel were raised during the state post-
 7 conviction proceedings. (Exhibit 137, at pp. 6-10). Each of petitioner’s current claims was rejected
 8 by the Nevada Supreme Court. (*Id.*). First, petitioner contends that trial counsel waited “months”
 9 before conducting any investigation. The Nevada Supreme Court found that this claim did not
 10 demonstrate ineffectiveness or prejudice. (Exhibit 137, at pp. 8-9). Petitioner failed to indicate what
 11 investigation should have been performed, how it would have changed the result of his trial, or how
 12 any delay in investigating affected him. (*Id.*).

13 Petitioner next claims that trial counsel was ineffective for allowing the apartment
 14 management company to move without obtaining the new address. The Nevada Supreme Court
 15 noted that petitioner failed to identify what information his counsel could have obtained that would
 16 have been helpful prior to the company moving. (Exhibit 137, at p. 9).

17 Petitioner claims that trial counsel failed to obtain a surveillance video from the incident at
 18 the apartment complex. The Nevada Supreme Court rejected the claim that counsel was ineffective,
 19 as the evidence at trial was that no videotape of the incident exhibited. (Exhibit 137, at p. 9).

20 Petitioner asserts that trial counsel was ineffective for “acting totally unaware” that witnesses
 21 should have been called to the suppression hearing. Petitioner complained of counsel’s preparation
 22 for the suppression hearing in his state post-conviction petition, although it is not clear what he
 23 means by counsel “acting totally unaware” that witnesses should be called. (Exhibit 130, at p. 32).
 24 The Nevada Supreme Court denied relief on petitioner’s claims regarding the suppression hearing.
 25 (Exhibit 137, at p. 10). Petitioner has not specified how he was prejudiced, what witnesses should
 26

1 have been called, or what information they would have provided. The record reflects that the motion
 2 to suppress was based heavily on sworn testimony provided by the security officers at a preliminary
 3 hearing, as well as taped statements provided to law enforcement. (Exhibit 6). Petitioner has not
 4 articulated what additional testimony would have been useful or relevant.

5 Petitioner also asserts that trial counsel was ineffective for failing to recognize the “nexus”
 6 between the management company, HUD, and various other law enforcement agencies. The Nevada
 7 Supreme Court rejected this claim, finding that it had already determined on direct appeal that the
 8 security officers were not state or federal actors. (Exhibit 137, at p. 10).

9 The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). The
 10 Nevada Supreme Court cited to and applied the correct federal standard of *Strickland v. Washington*,
 11 466 U.S. 668 (1984). (Exhibit 137, at p. 8). Petitioner has failed to meet his burden of proving that
 12 the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of,
 13 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
 14 was based on an unreasonable determination of the facts in light of the evidence presented in the
 15 state court proceeding. This Court denies habeas relief on Ground 14 of the petition.

16 **E. Ground 16**

17 In Ground 16, petitioner raises 33 sub-claims alleging the ineffective assistance of appellate
 18 counsel. The *Strickland* standard, as discussed earlier in this order, applies to challenges of effective
 19 appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no
 20 constitutional duty to raise every non-frivolous issue requested by the client. *Jones v. Barnes*, 463
 21 U.S. 745, 751-54 (1983). To state a claim of ineffective assistance of appellate counsel, a petitioner
 22 must demonstrate: (1) that counsel’s performance was deficient in that it fell below an objective
 23 standard of reasonableness, and (2) that the resulting prejudice was such that the omitted issue would
 24 have a reasonable probability of success on appeal. *Id.* The Nevada Supreme Court considered each
 25 claim presented in petitioner’s federal petition, as discussed below.

Sub-claims 1-3

2 Petitioner claims that appellate counsel was ineffective for failing to raise three issues, which
3 were, in fact, raised on direct appeal. Appellate counsel was not ineffective for failing to raise those
4 issues, because he did raise them, as noted by the Nevada Supreme Court. (Exhibit 137, at p. 12).
5 Petitioner has failed to demonstrate that his appellate counsel's performance was deficient or that he
6 was prejudiced

Sub-claim 4

8 Petitioner claims that appellate counsel did not argue that he was discriminated against by the
9 security officers at the apartment complex. The Nevada Supreme Court rejected petitioner's claim,
10 as follows:

11 Appellant failed to demonstrate that he was prejudiced. Regardless of
12 whether the EBMC employees discriminated against appellant and
13 Stewart, this court held that the employees were not state actors, thus,
the alleged violation did not amount to an error that could be addressed
on appeal from his judgment of conviction.

14 (Exhibit 137, at pp. 12-13) (footnote omitted). Petitioner has failed to demonstrate that his appellate
15 counsel would have had a reasonable possibility of success on a claim that he was discriminated
16 against by the security officers. Petitioner has failed to demonstrate that his appellate counsel's
17 performance was deficient or that he was prejudiced.

Sub-claim 5

19 Petitioner claims that appellate counsel did not argue that African Americans are too
20 outnumbered such that the jury pool will never be fair. Applying clearly-established federal law, the
21 Nevada Supreme Court found that petitioner failed to meet his burden of establishing “either under-
22 representation or systematic exclusion.” (Exhibit 137, at pp. 13-15). Petitioner has failed to
23 demonstrate that his appellate counsel would have had a reasonable possibility of success on a claim
24 that African Americans are too outnumbered such that the jury pool will never be fair. Petitioner has

1 failed to demonstrate that his appellate counsel's performance was deficient or that he was
2 prejudiced.

3 **Sub-claim 6**

4 Petitioner claims that appellate counsel failed to argue that the jury panel was impacted by a
5 juror's statements about his son's death. The Nevada Supreme Court rejected this claim, noting that
6 the jury was properly instructed that petitioner was presumed innocent and that the jury must hear all
7 evidence before forming an opinion on guilt. (Exhibit 137, at p. 15). Petitioner has failed to
8 demonstrate that his appellate counsel would have had a reasonable possibility of success on a claim
9 that the jury panel was impacted by a juror's statements about his son's death. Petitioner has failed
10 to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

11 **Sub-claim 7**

12 Petitioner claims that appellate counsel should have argued that his presumption of innocence
13 was lost when corrections staff accompanied him to bench conferences. The Nevada Supreme Court
14 noted that petitioner never objected and in fact consented to the officers accompanying him on prior
15 occasions. (Exhibit 137, at pp. 15-16). The Court found no authority which holds that officers
16 accompanying a *proper* defendant to the bench is unconstitutional. (Exhibit 137, at p. 16).
17 Petitioner does not allege that he was seen wearing visible restraints, does not allege how security
18 during bench conferences should have been maintained, and does not allege that the officers
19 accompanying him affected the outcome of his trial. Petitioner has failed to demonstrate that his
20 appellate counsel would have had a reasonable possibility of success on a claim that his presumption
21 of innocence was lost when corrections staff accompanied him to bench conferences. Petitioner has
22 failed to demonstrate that his appellate counsel's performance was deficient or that he was
23 prejudiced.

24 //////////

25 //////////

26

Sub-claim 8

2 Petitioner asserts that appellate counsel should have raised the issue of the clerk of court
3 losing his filings. The Nevada Supreme Court found that petitioner failed to show ineffectiveness or
4 prejudice, that the claim was conclusory, and that petitioner was later allowed to file the same
5 pleading. (Exhibit 137, at p. 17). Petitioner has failed to demonstrate that his appellate counsel
6 would have had a reasonable possibility of success on a claim regarding filings lost by the clerk of
7 court. Petitioner has failed to demonstrate that his appellate counsel's performance was deficient or
8 that he was prejudiced.

Sub-claim 9

10 Petitioner claims that prejudice is presumed anytime an African American person proceeding
11 *pro per* requests a transcript. The claim made to the Nevada Supreme Court included additional
12 information that the transcripts at issue were not provided and petitioner could not properly prepare
13 for trial. The federal claim does not include this detail, and is conclusory. The Nevada Supreme
14 Court found that even the claim presented to it was conclusory, as petitioner failed to identify what
15 transcripts he needed or how his preparation was affected. (Exhibit 137, at pp. 17-18). Petitioner
16 has failed to demonstrate that his appellate counsel would have had a reasonable possibility of
17 success on a claim that prejudice is presumed anytime an African American person proceeding *pro*
18 *per* requests a transcript. Petitioner has failed to demonstrate that his appellate counsel's
19 performance was deficient or that he was prejudiced.

Sub-claim 10

21 Petitioner claims that appellate counsel was ineffective for failing to argue sufficiency of the
22 evidence. The Nevada Supreme Court found that there was sufficient evidence by which a rational
23 trier of fact could find guilt beyond a reasonable doubt for petitioner's conviction. (Exhibit 137, at
24 pp. 18-19). The Nevada Supreme Court reached this conclusion by applying clearly established
25 federal law based on *Jackson v. Virginia*, 443 U.S. 307 (1979). (*Id.*). Petitioner has failed to

1 demonstrate that his appellate counsel would have had a reasonable possibility of success on a claim
2 challenging the sufficiency of the evidence. Petitioner has failed to demonstrate that his appellate
3 counsel's performance was deficient or that he was prejudiced.

4 **Sub-claim 11**

5 Petitioner contends that appellate counsel was ineffective for failing to argue that exculpatory
6 photographs were improperly withheld by the State in violation of *Brady*. Applying clearly
7 established federal authority, the Nevada Supreme Court determined that the photographs of drugs
8 seized from petitioner, if they existed, would not have been favorable to petitioner, and therefore no
9 unconstitutional action occurred. (Exhibit 137, at pp. 20-21). Petitioner has failed to demonstrate
10 that his appellate counsel would have had a reasonable possibility of success on a *Brady* violation
11 claim regarding the photographs. Petitioner has failed to demonstrate that his appellate counsel's
12 performance was deficient or that he was prejudiced.

13 **Sub-claim 12**

14 Petitioner asserts that appellate counsel was ineffective for failing to raise an issue
15 concerning the judge's interruptions during trial. In state court, petitioner clarified that he
16 specifically referred to interruptions during opening argument. The Nevada Supreme Court rejected
17 the claim, finding that there were only two interruptions and both were appropriate. (Exhibit 137, at
18 pp. 21-22). Petitioner has failed to demonstrate that his appellate counsel would have had a
19 reasonable possibility of success on the issue concerning the judge's interruptions during trial.
20 Petitioner has failed to demonstrate that his counsel's performance was deficient or that he was
21 prejudiced.

22 **Sub-claim 13**

23 Petitioner alleges that appellate counsel was ineffective for not challenging the trial judge's
24 interruptions during cross-examination as being designed to confuse the jury. The Nevada Supreme
25 Court found that there was an interruption which requested petitioner to re-ask a question, which
26

1 occurred and then an answer was given, and as such, neither ineffectiveness of counsel nor prejudice
2 was shown. (Exhibit 137, at pp. 22-23). Petitioner has failed to demonstrate that his appellate
3 counsel would have had a reasonable possibility of success on a claim challenging the trial judge's
4 interruptions during cross-examination. Petitioner has failed to demonstrate that his counsel's
5 performance was deficient or that he was prejudiced.

6 **Sub-claim 14**

7 Petitioner alleges that appellate counsel was ineffective for failing to challenge the admission
8 of a work order and four-year-old photographs during trial. The Nevada Supreme Court rejected the
9 claim, reasoning that even if improperly admitted, it was harmless where there was overwhelming
10 evidence of petitioner's guilt. (Exhibit 137, at pp. 23-24). Petitioner has failed to demonstrate that
11 his appellate counsel would have had a reasonable possibility of success on a claim challenging the
12 admission of a work order and photographs during his trial. Petitioner has failed to demonstrate that
13 his appellate counsel's performance was deficient or that he was prejudiced.

14 **Sub-claim 15**

15 Petitioner claims that appellate counsel was ineffective for failing to argue that the evidence
16 in his case, consisting of drugs, was tainted while in the custody of the North Las Vegas Police
17 Department by being sold. The Nevada Supreme Court noted that evidence at trial substantiated the
18 chain of evidence and petitioner failed to demonstrate that there was any tampering with the
19 evidence. (Exhibit 137, at pp. 25-26). Petitioner has failed to demonstrate that his appellate counsel
20 would have had a reasonable possibility of success on a claim that evidence was tainted while in
21 police custody. Petitioner has failed to demonstrate that his appellate counsel's performance was
22 deficient or that he was prejudiced.

23 **Sub-claim 16**

24 Petitioner claims that appellate counsel was ineffective for failing to challenge the chemist's
25 testimony at trial as speculative. The Nevada Supreme Court noted that expert witness Carol
26

1 Crossley was properly qualified as an expert in the testing of controlled substances due to her
2 specialized training and knowledge, as reflected in the trial transcripts. (Exhibit 137, at pp. 24-25).
3 The Court also noted that petitioner did not object to the expert's certification or testimony during
4 trial. (*Id.*). Petitioner was had an opportunity to cross-examine expert witness Crossley but he
5 decided not to ask any questions. (Exhibit 107, at p. 202). Petitioner has failed to demonstrate that
6 his appellate counsel would have had a reasonable probability of success on a claim that the district
7 court erred in admitting the expert's testimony. Petitioner has failed to demonstrate that his appellate
8 counsel's performance was deficient or that he was prejudiced.

9 **Sub-claim 17**

10 Petitioner contends that appellate counsel was ineffective for failing to challenge statements
11 made by petitioner to security officers or to the North Las Vegas Police Department as being in
12 violation of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Nevada
13 Supreme Court noted that at trial, the State did not seek to introduce any statements made by
14 petitioner while he was in the custody of the North Las Vegas Police Department. (Exhibit 137, at p.
15 26). The Court further found that while the private security guards testified that petitioner made
16 statements while he was detained, it was previously determined that they were not state actors, and as
17 such, no *Miranda* violation occurred. (*Id.*, at pp. 26-27). Petitioner has failed to demonstrate that his
18 appellate counsel would have had a reasonable possibility of success on a *Miranda* challenge.
19 Petitioner has failed to demonstrate that his appellate counsel's performance was deficient or that he
20 was prejudiced.

21 **Sub-claim 18**

22 Petitioner asserts that appellate counsel should have argued that he was deprived of a
23 "complete defense" when several witnesses, such as an investigator, were not subpoenaed for trial.
24 The Nevada Supreme Court found that the investigator was not relevant to any issues at trial, as he
25 would only have testified about the status of the security officers and that issue had already been
26

1 determined in a pretrial motion. (Exhibit 137, at pp. 27-28). Petitioner has not demonstrated that his
 2 appellate counsel would have had a reasonable possibility of success on the claim that an investigator
 3 was not subpoenaed for trial. Petitioner has failed to demonstrate that his appellate counsel's
 4 performance was deficient or that he was prejudiced.

5 **Sub-claim 19**

6 Petitioner claims that appellate counsel should have raised an issue that the trial judge forced
 7 stand-by counsel upon him, which hindered his right to testify on his own behalf. The Nevada
 8 Supreme Court found that the trial court did not err by appointing stand-by counsel. (Exhibit 137, at
 9 p. 7). The Nevada Supreme Court further ruled that the trial court's warning to petitioner, informing
 10 him of the consequences of testifying on his own behalf, did not improperly hinder his ability to
 11 testify. (Exhibit 137, at p. 28). Petitioner represented himself at trial and had the ultimate authority
 12 to testify if he wanted to do so. Petitioner has not demonstrated that his appellate counsel would
 13 have had a reasonable probability of success on a claim that his right to testify on his own behalf was
 14 hindered by stand-by counsel or by the trial court. Petitioner has failed to demonstrate that his
 15 appellate counsel's performance was deficient or that he was prejudiced.

16 **Sub-claim 20**

17 Petitioner claims that appellate counsel was ineffective for failing to challenge the entire case
 18 based on prosecutorial vindictiveness. The Nevada Supreme Court found there was no prejudice, as
 19 the State did not add new charges to the case or increase the severity of existing charges, and the
 20 mere fact that multiple prosecutors handled the case did not establish vindictiveness. (Exhibit 137,
 21 at pp. 28-29). Petitioner has not demonstrated that his appellate counsel would have had a
 22 reasonable probability of success on a claim of prosecutorial vindictiveness. Petitioner has failed to
 23 demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

24 //////////////

25 //////////////

26

Sub-claim 21

2 Petitioner contends that appellate counsel should have argued that “unspecified” persons
3 conspired to deprive him of his rights at trial. The Nevada Supreme Court rejected this claim, as
4 petitioner failed to allege or prove ineffectiveness of counsel or prejudice. (Exhibit 137, at pp. 29-
5 30). Petitioner has not demonstrated that his appellate counsel would have had a reasonable
6 probability of success on a claim that “unspecified” persons conspired to deprive him of a fair trial.
7 Petitioner has failed to demonstrate that his appellate counsel’s performance was deficient or that he
8 was prejudiced.

Sub-claim 22

10 Petitioner claims that appellate counsel was ineffective for failing to raise a claim of
11 prosecutorial misconduct. In the federal petition, petitioner fails to specify the nature of the alleged
12 prosecutorial misconduct. (ECF No. 12). The Nevada Supreme Court, which was apparently
13 presented with specific incidents of alleged misconduct, ruled that petitioner failed to allege or
14 demonstrate ineffectiveness of counsel or prejudice. (Exhibit 137, at pp. 30-31). Petitioner has
15 failed to demonstrate that his appellate counsel would have had a reasonable probability of success
16 on a claim of prosecutorial misconduct. Petitioner has failed to demonstrate that his appellate
17 counsel's performance was deficient or that he was prejudiced.

Sub-claim 23

19 Petitioner contends that appellate counsel should have argued that the trial judge improperly
20 instructed the jury as to several lesser offenses. The Nevada Supreme Court ruled that the jury
21 instructions were correct under Nevada state law. (Exhibit 137, at p. 32). Petitioner has failed to
22 demonstrate that his appellate counsel would have had a reasonable possibility of success on a claim
23 challenging the jury instructions. Petitioner has failed to demonstrate that his appellate counsel's
24 performance was deficient or that he was prejudiced.

25 // / / / / / / / /

Sub-claim 24

2 Petitioner asserts that his appellate counsel failed to argue that he denied his right to present
3 an entrapment defense. The Nevada Supreme Court noted that there was no evidence at trial that
4 petitioner was induced by the government to sell cocaine. (Exhibit 137, at pp. 33-34). Petitioner has
5 failed to demonstrate that his appellate counsel would have had a reasonable possibility of success on
6 a claim that he was denied his right to present an entrapment defense. Petitioner has failed to
7 demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 25

9 Petitioner claims that he was prejudiced when he was not provided a trial transcript prior to
10 filing his motion for a new trial. In ruling on this claim, the Nevada Supreme Court noted that
11 petitioner was asked by the trial court which claims he wanted to raise in the motion for new trial
12 which he could not raise without the transcript. (Exhibit 137, at p. 35). Petitioner failed to inform
13 the trial court as to what those claims would be, and his motion for a transcript was denied. (*Id.*).
14 To the extent petitioner claims ineffective assistance of appellate counsel, petitioner has not
15 demonstrated that his appellate counsel would have had a reasonable possibility of success on a
16 claim that he was wrongly denied trial transcripts. Petitioner has failed to demonstrate that his
17 appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 26

19 Petitioner claims that he was prejudiced when the trial court ruled on his motion for a new
20 trial without having the full trial transcript. The Nevada Supreme Court ruled that the district court
21 did not err in denying his motion for a new trial. (Exhibit 137, at pp. 35-36). To the extent
22 petitioner claims ineffective assistance of appellate counsel, petitioner has not demonstrated that his
23 appellate counsel would have had a reasonable possibility of success on a claim that the trial court
24 ruled on his motion for a new trial without having the full trial transcript. Petitioner has failed to
25 demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 27

2 Petitioner asserts that he was unable to challenge errors in the pre-sentence report. The
3 Nevada Supreme Court ruled that petitioner failed to specify what information was incorrect or how
4 corrected information would have affected his sentence, which was valid and within statutory limits.
5 (Exhibit 137, at p. 37-38). To the extent petitioner claims ineffective assistance of appellate counsel,
6 petitioner has not demonstrated that his appellate counsel would have had a reasonable possibility of
7 success on a claim that he was unable to challenge errors in the pre-sentence report. Petitioner has
8 failed to demonstrate that his appellate counsel's performance was deficient or that he was
9 prejudiced.

Sub-claim 28

11 Petitioner claims that appellate counsel was ineffective for failing to challenge the
12 “discriminatory” methods used by the trial judge during sentencing. The Nevada Supreme Court
13 ruled that the sentence imposed was within Nevada statutory limits and it did not impose cruel and
14 unusual punishment. (Exhibit 137, at p. 38). Petitioner has failed to demonstrate that his appellate
15 counsel would have had a reasonable possibility of success on a claim that the trial court used
16 discriminatory methods in sentencing. Petitioner has failed to demonstrate that his appellate
17 counsel’s performance was deficient or that he was prejudiced.

Sub-claim 29

19 Petitioner claims that appellate counsel should have challenged the performance of stand-by
20 counsel. The Nevada Supreme Court found that there was no claim of ineffective assistance of
21 counsel appropriate to have been raised on direct appeal. (Exhibit 137, at pp. 38-39). Petitioner has
22 failed to demonstrate that his appellate counsel would have had a reasonable possibility of success on
23 a claim challenging the performance of stand-by counsel. Petitioner has failed to demonstrate that
24 his appellate counsel's performance was deficient or that he was prejudiced.

25 | // / / / / / / / /

Sub-claim 30

2 Petitioner alleges that appellate counsel was ineffective for failing to challenge Justice Mark
3 Gibbons from hearing his direct appeal, because Gibbons had, as a trial judge, overseen petitioner's
4 arraignment. The Nevada Supreme Court found that petitioner failed to demonstrate deficient
5 performance of counsel or prejudice. (Exhibit 137, at pp. 39-40). The Court ruled that petitioner
6 failed to demonstrate that Justice Gibbons harbored an actual or implied bias. (*Id.*). "Justice
7 Gibbons' role as judge during appellant's arraignment was limited, did not require any substantive
8 rulings, and did not require disqualification." (*Id.*, at p. 39). Petitioner has failed to demonstrate that
9 his appellate counsel would have had a reasonable possibility of success on a claim that Justice
10 Gibbons should have been disqualified from hearing his direct appeal. Petitioner has failed to
11 demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 31

13 Petitioner asserts that his appellate counsel failed to argue that Justice Douglas, then Judge
14 Douglas, was biased or conspired with the prosecution. The Nevada Supreme Court found that
15 petitioner failed to allege any facts other than the speculative assertion that Justice Douglas was irate
16 with him due to his prior allegations of bias. (Exhibit 137, at pp. 40-41). Petitioner has failed to
17 demonstrate that his appellate counsel would have had a reasonable possibility of success on a claim
18 that Justice Douglas was biased or conspired with the prosecution. Petitioner has failed to
19 demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 32

21 Petitioner claims that appellate counsel failed to challenge Judge Leavitt on the ground of
22 bias. The Nevada Supreme Court ruled that petitioner's claims of bias were not supported by facts.
23 (Exhibit 137, at p. 41). Petitioner has failed to demonstrate that his appellate counsel would have
24 had a reasonable possibility of success on a claim that Judge Leavitt was biased. Petitioner has failed
25 to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Sub-claim 33

2 Petitioner claims that his appellate counsel's errors resulted in cumulative error. The Nevada
3 Supreme Court ruled that petitioner failed to allege or prove any error, therefore, there was no
4 cumulative error. (Exhibit 137, at p. 42).

5 To the extent that cumulative error may be grounds for federal habeas relief, the Ninth Circuit
6 has announced that: “[T]he combined effect of multiple trial court errors violates due process where
7 it renders the resulting criminal trial fundamentally unfair.” *Parle v. Runnels*, 505 F.3d 922, 927 (9th
8 Cir. 2007). This Court has reviewed the state court record and the pleadings filed by the parties.
9 Petitioner has not demonstrated that cumulative errors occurred, and even assuming errors did occur,
10 that such errors resulted in proceedings that were fundamentally unfair.

11 The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). The
12 Nevada Supreme Court cited to and applied the correct federal standards articulated in *Strickland v.*
13 *Washington*, 466 U.S. 668 (1984) and *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). (Exhibit 137,
14 at pp. 8, 12). The Nevada Supreme Court's rulings as to all 33 sub-claims of Ground 16 have been
15 set forth in this order. Petitioner has failed to meet his burden of proving that the Nevada Supreme
16 Court's rulings were contrary to, or involved an unreasonable application of, clearly established
17 federal law, as determined by the United States Supreme Court, or that the rulings were based on an
18 unreasonable determination of the facts in light of the evidence presented in the state court
19 proceeding. This Court denies habeas relief on Ground 16 in its entirety.

F. Ground 27

21 Petitioner once again argues that appellate counsel was ineffective due to cumulative error.
22 As discussed earlier in this order, to the extent that cumulative error may be grounds for federal
23 habeas relief, the Ninth Circuit has announced that: “[T]he combined effect of multiple trial court
24 errors violates due process where it renders the resulting criminal trial fundamentally unfair.” *Parle*
25 *v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007). This Court has reviewed the state court record and the

1 pleadings filed by the parties. Petitioner has not demonstrated that cumulative errors occurred, and
2 even assuming errors did occur, that such errors resulted in proceedings that were fundamentally
3 unfair. Habeas relief is denied as to Ground 27.

4 **IV. Certificate of Appealability**

5 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
6 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
7 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
8 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
9 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
10 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s
11 assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In
12 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
13 debatable among jurists of reason; that a court could resolve the issues differently; or that the
14 questions are adequate to deserve encouragement to proceed further. *Id.*

15 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section
16 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the
17 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice
18 of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
19 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
20 issuance of a certificate of appealability, and determines that none meet that standard. The Court
21 will therefore deny petitioner a certificate of appealability.

22 **V. Conclusion**

23 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus is **DENIED**
24 **IN ITS ENTIRETY.**

25
26

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY.**

3 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
4 **ACCORDINGLY.**

5 Dated this 23 day of July, 2012.



UNITED STATES DISTRICT JUDGE